# IN THE SUPREME COURT OF TEXAS

NO. 03-1128

SANDY DEW, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF PAUL DEW, DECEASED, AND CARL DEW AND DORIS DEW, PETITIONERS,

v.

CROWN DERRICK ERECTORS, INC., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

**Argued January 4, 2005**

JUSTICE JOHNSON, joined by JUSTICE HECHT and JUSTICE GREEN, dissenting.

The issue before us is whether some evidence and permissible inferences from the evidence support Crown Derrick's contention that it was entitled to have a "new and independent cause" instruction in the jury charge. The court of appeals concluded that there was such evidence, reversed the judgment against Crown Derrick, and remanded for a new trial. 117 S.W.3d 526, 537. I agree with the court of appeals and would affirm its judgment.

## I. Factual Background

The Gorilla V drilling rig where Paul Dew fell to his death on September 23, 1998, was owned by the Rowan Companies, Inc. Rowan had contracted with (1) Woolslayer Companies, Inc.,

to design and manufacture the rig; (2) LeTourneau, Inc., to build the rig; and (3) Crown Derrick to assemble the rig's derrick. The derrick was first to be assembled in three components which were later to be mounted onto the rig.

Because the Gorilla V was to be used in the North Sea, it was required to have two ladders and associated ladder openings to access the different levels of the rig, including the derrick and the derrick's fourble platform. Woolslayer designed the required ladder openings with safety gates around them.

Crown Derrick began the first phase of assembling the derrick into its three components in March 1998. During that part of the assembly process, safety gates and hardware for the crown platform were located, but hardware required to hang a second safety gate on the fourble platform was not. Crown Derrick completed the first phase of the derrick assembly work and left the jobsite.

In August 1998, Crown Derrick returned to the jobsite to mount the derrick's three component pieces onto the rig and complete the assembly and installation. As assembly of the derrick and installation on the rig progressed, hardware required to install a safety gate was still available for only one of the two fourble platform ladder openings. Crown Derrick installed a gate on one of the ladder openings. Having not received mounting hardware for the other ladder opening by the time it was ready to leave the jobsite on August 28, Crown Derrick placed a double-rope barrier on both sides of the ladder opening to prevent workers from falling through it. There was evidence at trial that the double-rope barrier complied with Occupational Safety and Health Administration (OSHA) requirements. Rowan's worksite safety rules required walkaround access openings such as the ladder opening to have "hatches/handrails with gates or *some means* to prevent

personnel falling through openings." (emphasis added). Crown Derrick presented testimony at trial that the double-rope barrier complied with Rowan's safety rules.

On September 22, 1998, Crown Derrick returned to the rig construction site to finish hanging the ladders on the derrick. Because of a broken crane, Crown Derrick was unable to get to the fourble platform and left the rig without checking or doing any work on the platform or hanging the ladders.

On September 23, Paul Dew fell through the un-gated ladder opening. He died as a result of the fall.

Testimony was conflicting as to whether a rope barrier protecting the ladder opening was in place when Dew fell. An eyewitness testified that shortly after Dew fell, a worker was seen erecting a rope barrier across one side of the opening. There was evidence that when Crown Derrick left the construction site in August, Rowan's onsite construction manager was told that rope barriers had been placed over the hole for safety, and that Rowan's manager agreed to keep workers off the unfinished platform. There was evidence that sometime between the time Crown Derrick left the worksite in August and Dew's fall on September 23, the double-rope barrier was removed and a two-foot-wide, four-foot-long, and five- to six-foot-tall electrical junction box was placed over the opening. There was also evidence that the junction box was too heavy to be moved manually, so it was subsequently removed by use of an air hoist, and a single-rope barrier was placed around the opening. There was evidence that one week before Dew fell, Rowan's construction manager was on the fourble platform, saw the ladder opening with a single-rope barrier around it, but took no action to change the barrier.

## II. New and Independent Cause

### A. Nature of the Instruction

The purality opinion refers to "new and independent cause" as an inferential rebuttal defense which operates to rebut an element of the plaintiff's case by proof of other facts. ___ S.W.3d ___ (citing *Dillard v. Tex. Elec. Coop.*, 157 S.W.3d 429, 430 (Tex. 2005) and COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—GENERAL NEGLIGENCE & INTENTIONAL PERSONAL TORTS PJC 3.1-3.5 (2003)). The basic characteristic of an inferential rebuttal is that it presents a contrary or inconsistent theory from the claim relied upon for recovery. *See Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 477 (Tex. 1978). Although "new and independent cause" has been referred to on occasion as an inferential rebuttal theory or defense, *see* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—GENERAL NEGLIGENCE & INTENTIONAL PERSONAL TORTS PJC 3.1, cmt. (2003), the instruction has historically been viewed as part of the definition of "proximate cause." *See Dallas Ry. & Terminal Co. v. Bailey*, 250 S.W.2d 379, 383–84 (Tex. 1952) ("The theory of new and independent cause is not an affirmative defense; it is but an element to be considered by the jury in determining the existence or non-existence of proximate cause.").

### B. Standard of Review

We review a trial court's decision to submit or refuse a particular instruction under an abuse of discretion standard of review. *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000). A party is entitled to a jury question, instruction, or definition if the pleadings and evidence raise an issue. TEX. R. CIV. P. 278; *Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002). A trial court's error in

refusing an instruction is reversible if it "probably caused the rendition of an improper judgment." TEX. R. APP. P. 61.1(a); *Union Pac. R.R. Co.*, 85 S.W.3d at 166.

We have long held that because new and independent cause is part of the proximate cause definition, omission of the instruction and definition is reversible error. *See Young v. Massey*, 101 S.W.2d 809, 810 (Tex. 1937) (stating that "[i]t is the settled law of this State that if the evidence in a negligence case raises the issue of new and independent cause, it is reversible error not to include the term in the definition of proximate cause" and that "if such term is necessary to be used in the definition of proximate cause, it is reversible error not to define it"); *Southland Greyhound Lines, Inc. v. Cotten*, 91 S.W.2d 326, 328 (Tex. 1936) ("It is reversible error, in a cause in which the testimony tends to prove the injury resulted from a new independent cause, not to submit a definition of 'proximate cause' embodying that term, or a similar term, together with a definition of same."); *see also Bailey*, 250 S.W.2d at 384; *Tarry Warehouse & Storage Co. v. Duvall*, 115 S.W.2d 401, 405 (Tex. 1938) ("This court has repeatedly held that where the testimony raises the issue of 'new and independent cause,' the trial court should define such issue, and that it is reversible error not to do so."); *Tex. Motor Coaches, Inc. v. Palmer*, 121 S.W.2d 323, 323–24 (Tex. 1938) (same); *Orange & N.W. R.R. v. Harris*, 89 S.W.2d 973, 975 (Tex. 1936); *Dixie Motor Coach Corp. v. Galvan*, 86 S.W.2d 633, 634 (Tex. 1935); *Phoenix Ref. Co. v. Tips*, 81 S.W.2d 60, 61–62 (Tex. 1935).

As we explained in *Cotten*,

> The term "proximate cause" is a legal term with a fixed and long-established legal meaning. The word in the term which necessitates that it be defined so as to convert it into language employing words of ordinary meaning is the word "proximate." . . . "The question always is, Was there an unbroken connection? . . . Or was there some new and independent cause intervening between the wrong and the injury?" "New

> and independent cause" is likewise a term of fixed legal meaning that must be defined. Again it is not the word "cause" that necessitates a definition of the term; it is the words "new and independent." In other words, there are two kinds of causes to be considered by the jury when there is evidence that negligent acts other than the alleged negligent acts of the parties was responsible for the injury. It is necessary that they be translated by definition into words of such ordinary meaning, and so differentiated, as to enable the jury to properly pass upon the issues.

91 S.W.2d at 328–29 (quoting *Tex. & Pac. Ry. Co. v. Bigham*, 38 S.W. 162, 164 (Tex. 1896)).

Over one hundred years ago we held that the trial court's refusal to submit an instruction on an "unavoidable accident" was reversible error, even though other aspects of the jury charge covered the defensive matter. *Galveston, H. & S.A. Ry. Co. v. Washington*, 63 S.W. 534, 538 (Tex. 1901). We recognized that in reviewing omissions from the jury charge, we must view the charge "as practical experience teaches that a jury, untrained in the law, would view it." *Id*. Our reason for requiring such a defensive theory to be submitted holds just as true today as then:

> It is claimed by counsel for [the plaintiff] that the defense presented by this special charge was covered by the general charge of the court in which the jury were instructed . . . [but] it is not to be supposed that the jury considered an issue not developed by the charge of the court. Under such circumstances the defendant had the right to call upon the court to submit specifically the group of facts and circumstances which raised the issues expressed in the special charge. Without this protection, the jury, in rendering a general verdict under a charge so general as that given, may have disregarded a defense which they might have given effect to, if it had been brought to their attention.

*Id*.; *see also Reinhart v. Young*, 906 S.W.2d 471, 476 (Tex. 1995) (Hecht, J., concurring). Although we have moved to broad-form jury submissions, we do not use the broad-form submissions as a vehicle to deny a party the correct charge to which the party would otherwise be entitled. *See Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 227 (Tex. 2005).

### C. Nature of the Evidence Required

Generally, one person is not bound to anticipate negligent conduct on the part of another. *See Ft. Worth & D.C. Ry. Co. v. Shetter*, 59 S.W. 533, 535 (Tex. 1900). However, a person's negligence will not be excused where wrongful conduct of a third party is a foreseeable result of such negligence. *See El Chico Corp. v. Poole*, 732 S.W.2d 306, 314–15 (Tex. 1987) (holding that a tortfeasor's negligence is not superseded by an intervening force or event when the intervening force or event is a foreseeable result of the negligence); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 550 (Tex. 1985) (noting that subsequent criminal conduct is not a superseding cause of an injury if the criminal conduct is a foreseeable result of the tortfeasor's negligence). Nor will negligence of a party be excused if an alleged new cause is not such as to break the chain of causation and the original negligence concurs in causing the injury. *See Gulf, C. & S.F. Ry. Co. v. Ballew*, 66 S.W.2d 659, 661 (Tex. Comm'n App. 1933, holding approved) (holding that "[w]hen the new cause or agency concurs with the continuing and co-operating original negligence in working the injury," the original party's negligence "remains a proximate cause of the injury, and the fact that the new concurring cause or agency may not in such case have been reasonably foreseeable should not relieve the wrongdoer of liability").

So, two aspects of causation are involved in an intervening event or action rising to the level of a new and independent cause. First, the intervening event or action must not be ordinarily or reasonably foreseeable. *See Phan Son Van v. Peña*, 990 S.W.2d 751, 754 (Tex. 1999). Second, the original acts and omissions must have run their course and been completed so that they did not

actively contribute in any way to the injuries involved. *See Bell v. Campbell*, 434 S.W.2d 117, 122 (Tex. 1968).

In determining whether an intervening force rises to the level of a superseding cause, we have found the factors set forth in section 442 of the Restatement of Torts instructive. *Phan Son Van*, 990 S.W.2d at 754–55. Those factors are:

> (a) the fact that the intervening force brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> (b) the fact that the intervening force's operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of the force's operation;
>
> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
>
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
>
> (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
>
> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

*Id*. (quoting RESTATEMENT (SECOND) OF TORTS § 442 (1965)).

In *Phan Son Van* we were reviewing a summary judgment to determine whether the proof of intervening cause was conclusive and warranted summary judgment. *Id*. Here we are faced with a different issue: whether there was legally sufficient evidence to raise the issue of intervening cause. *See Bailey*, 250 S.W.2d at 384. The questions of foreseeability and proximate cause generally involve practical inquiries based on "common experience applied to human conduct." *See City of*

*Gladewater v. Pike*, 727 S.W.2d 514, 518 (Tex. 1987) (citation omitted). There is legally sufficient evidence of a matter when the proof and inferences from the proof furnish a reasonable basis for reasonable minds to reach differing conclusions as to the existence of the matter. *See Orozco v. Sander*, 824 S.W.2d 555, 556 (Tex. 1992).

## III. Analysis

To determine if there is evidence supporting Crown Derrick's requested new and independent cause instruction, we must review the record to see if there is more than a scintilla of evidence on which reasonable jurors could base a finding that (1) Crown Derrick would not have ordinarily or reasonably foreseen that, even if its rope barriers were removed, the walkway would be left without protection to prevent personnel from falling into the opening; and (2) Crown Derrick's allegedly negligent actions were not continuing, but were complete and had come to rest. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005); *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003). Although much of the evidence and testimony is in conflict, there is some evidence which would support findings in Crown Derrick's favor as to both such matters.

### A. Foreseeability

The fact that OSHA regulations and industry safety policies existed as to openings on construction sites could support an inference that Crown Derrick would not reasonably foresee Rowan or its contractors removing barriers from around the ladder opening and then leaving the opening unprotected in violation of safety regulations and policies. Further, Rowan had its own worksite safety policies in place, requiring that all openings be protected in some manner by hatches/handrails with gates or some means to prevent personnel from falling through openings.

When Crown Derrick left the jobsite, the opening had some means to prevent personnel from falling through the opening. There is evidence that before Dew's accident on September 23, Crown Derrick was not placed on notice that its safety barriers (or their absence) were related to any accidents at the ladder opening and that Crown Derrick did not have control of the fourble platform after it left the jobsite in August.

Evidence was introduced that after Crown Derrick's rope barriers were taken down, worksite and industry safety policies were complied with by persons (1) covering the opening with a heavy electrical junction box, and (2) when Rowan removed that box, erecting more rope barriers. Such evidence would support an inference that Crown Derrick's anticipating the opening would not be left unprotected in violation of safety policies was reasonable. There was evidence that Rowan's experienced construction supervisor was on the fourble platform a week before the accident and noted the presence of a rope barrier at the ladder opening. Such evidence would support inferences that (1) Rowan's supervisors were aware of the safety rules and inspected the rig to enforce compliance with them, including the rule that openings in walkways were not to be left without safety protections; and (2) the opening being left unprotected by third parties in violation of safety regulations and policies was not reasonably foreseeable to Crown Derrick.

**B. Concurring Cause**

The opening in the walkway was a required feature of the rig because it was to be used in the North Sea. Evidence showed that Crown Derrick assembled the derrick and walkway as it was designed, except as to the safety gate for which no mounting hardware was available. In lieu of a safety gate, rope barriers were placed and some evidence showed that the barriers complied with

safety rules and would have prevented personnel from falling into the opening. Subsequent removal of the rope barriers and covering of the opening with a junction box was evidence that Crown Derrick's long-completed actions were not a continuing cause of later events such as Dew's fall. Accordingly, there was evidence which would have allowed a jury to infer that absent subsequent independent acts of persons not under Crown Derrick's control, the rope barriers would have prevented Dew from falling through the opening. In sum, there was evidence that Crown Derrick's actions as to safety protections for the opening were complete, had come to rest, and that absent new and independent actions of third parties, Dew would not have fallen.

### C. Restatement Factors

Reviewing the evidence in light of factors in section 442 also leads to the conclusion that the removal of Crown Derrick's barriers and failure to replace the barriers or otherwise protect the ladder opening was a new and independent cause of the accident. RESTATEMENT (SECOND) OF TORTS § 442 (1965). The removal of not only Crown Derrick's barrier but also the subsequently placed additional protective devices and failure to reinstall some sort of protection appears to be extraordinary in view of the industry's and Rowan's safety rules, which were applicable to all workers on the rig. *See id.* § 442(b). The removal by third parties of not only rope barriers from around the opening, but a heavy metal covering placed on the opening at one time, reflect actions operating independently of the situation created when Crown Derrick placed barriers around the designed opening, which some evidence showed complied with applicable safety guidelines. *See id.* § 442(c). The failure to protect the opening after removal of Crown Derrick's rope barriers was due to third persons working in a controlled construction environment, not Crown Derrick's employees. *See id.* § 442(d). The

removal of Crown Derrick's rope barriers by third persons and failure of those third persons to then place protective devices around the opening was wrongful toward Dew and was such as could subject the third persons to liability for Dew's injuries. *See id*. § 442(e). The removal of Crown Derrick's protective rope barriers and failure to reinstall some protective mechanism could be viewed as a culpable wrongful act by a third person in connection with the accident. *See id*. § 442(f).

**IV. Application**

The plurality opinion says that the risk of injury within control of and created by Crown Derrick was the risk of injury due to an open hole in the walkway without adequate safeguards. But, the risk of having a ladder opening in a walkway was not a risk within the control of Crown Derrick. The ladder opening was required by safety rules for drilling rigs to be used in the North Sea. Moreover, industry standards, as well as OSHA's and Rowan's safety rules, recognize a fact of life on construction sites: sometimes openings must be left in floors and walkways for various reasons due to the nature of the construction process. One such reason is the reason for the opening in this case: it was a designed feature.

The risk within the control of Crown Derrick was the risk presented by inadequate safeguarding of the opening. The Court's judgment denies to Crown Derrick its right to have the jury be properly instructed on the question of whether Crown Derrick should have foreseen that third parties would violate industry, OSHA, and worksite safety rules by leaving the ladder opening unprotected, and whether actions of other parties broke the causation chain between any actions by Crown Derrick and Dew's fall.

Foreseeability requires more than viewing the facts in retrospect and charging a party to anticipate an extraordinary sequence of events whereby the defendant's conduct can be said to bring about the injury. *See Doe v. Boys Clubs*, 907 S.W.2d 472, 478 (Tex. 1995). The evaluation of evidence as to foreseeability and proximate cause generally involves practical inquiries based on common experience applied to human conduct. *See City of Gladewater*, 727 S.W.2d at 518.

As to harm from the omission, whether Crown Derrick's actions had come to rest and the actions of Rowan and its other contractors were new and independent causes of Dew's fall was a hotly contested issue throughout the trial. Crown Derrick contended in the court of appeals that there was legally insufficient evidence of both elements of proximate cause—cause-in-fact and foreseeability—for the jury finding to be upheld. Although the court of appeals overruled that contention, the evidence on the issue, some of which is referred to above and more of which is referenced by the court of appeals' opinion, reflected the magnitude of the contest at trial over the question.

What we said long ago bears repeating: In reviewing omissions from the jury charge, "we should view the charge as practical experience teaches that a jury, untrained in the law, would view it." *Washington*, 63 S.W. at 538. The discussions in reported cases of whether proximate cause instructions should or should not include new and independent cause language bear witness to the subtleties involved in what is a sufficient subsequent event or force to break the chain of causation between a party's negligence and an occurrence. To fail to instruct the jury on an established legal doctrine raised by the evidence and in serious contention at trial should not be held to be harmless error.

## V. Conclusion

I would hold that a practical view of the evidence in this record yields the conclusion that there is legally sufficient evidence of new and independent cause to require the instruction to have been given as requested by Crown Derrick. I would also hold that the trial court's failure to give the instruction was not harmless.

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Phil Johnson
Justice

**OPINION DELIVERED:** June 30, 2006